STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

**PROVIDENCE, SC. SUPERIOR COURT**

**(Filed: January 17, 2012)**

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| **WILLIAM H. GRADY, individually; and WILLIAM H. GRADY, derivatively on behalf of REBUILDERS AUTOMOTIVE SUPPLY CO., INC., as a shareholder of the corporation** | : | |
| **V.** | : | **C.A. No. PB 09-0367** |
| | : | **C.A. No. PB 09-0372** |
| **ROBERT J. GRADY; and STEVEN M. KING** | : | **(consolidated)** |
| | : | |
| **ROBERT J. GRADY and STEVEN M. KING, individually and derivatively on behalf of REBUILDERS AUTOMOTIVE SUPPLY CO., INC.,** | : | |
| **V.** | : | |
| **WILLIAM H. GRADY** | : | |

## DECISION

**Silverstein, J.** Before the Court are cross-motions pursuant to Super. R. Civ. P. 56, for partial summary judgment filed by Plaintiff William H. Grady (hereinafter "William") and Defendants Robert J. Grady and Steven M. King (hereinafter "Robert" and "Steven" respectively, and "Defendants" collectively). The individual Parties are the sole shareholders and directors of Rebuilders Automotive Supply Co., Inc. (hereinafter "RAS" or "Company"), upon whose behalf all the individual parties have filed derivative claims. This case concerns the provisions of a 1994 Shareholders Agreement entered into among the individual Parties. At issue is whether Defendants' termination of William as an

employee with RAS and subsequent demand that he sell back his shares to them pursuant to the repurchase provisions of the 1994 Agreement constituted a breach of Defendants' fiduciary duties owed to William as a shareholder of a close corporation and/or whether William was wrongfully terminated.

## I

## Facts and Travel

RAS is a Rhode Island corporation with places of business in Coventry, Rhode Island and Tampa, Florida. It is engaged in the salvaging and reselling of used automobile parts. RAS sells these parts to re-manufacturers for use in the automotive parts supply industry. The Company was established in 1972 by Theodore W. Eckstein (hereinafter "Eckstein") who until December 27, 1985 was RAS' sole shareholder. William and Robert are adopted sons of Eckstein's, and during the Company's infancy, William began working for RAS as one of its three employees. Over the course of the subsequent decade, RAS' business increased and the Company moved to larger quarters, and William's role in managing the Company as well as his compensation increased. Around this same time, Robert and Steven, a friend of the family, joined RAS as employees.

At various times between December 27, 1985 and December 14, 1992, Eckstein gave William shares of RAS, which by the end of this period numbered 1,120 in aggregate—44.8% of the then outstanding shares of the Company. Shortly thereafter, on December 30, 1992 and on January 4, 1993, Eckstein and William each gave shares to Robert and Steven resulting in (1) Eckstein owning 1,256 shares, (2) William owning 996 shares, and (3) Robert and Steven owning 124 shares each.

In July of 1994, William, Robert and Steven entered into a shareholders' agreement (hereinafter "1994 Agreement"), which recited their ownership of shares at that time (996, 124 and 124 respectively) and that the three owned or expected to own all of the issued and outstanding shares of RAS in a ratio reflected by the number of shares then owned at the time by each of the Parties. Neither Eckstein nor RAS were parties to the 1994 Agreement. At the time the 1994 Agreement was signed, Eckstein held a majority interest in the Company with 1,256 shares. A relevant portion of the Agreement stated:

> "A. Upon the death of a Shareholder, the remaining Shareholders shall be obligated to purchase (and the estate of such deceased Shareholder shall be obligated to sell) all Shares owned by such deceased Shareholder and owner at the time of the death of such Shareholder. Unless they otherwise agree, each remaining Shareholder shall be obligated to purchase that proportion of such Shares which the number of Shares he then owns bears to the total number of Shares owned by both remaining Shareholders. . . .
> B. If a Shareholder ceases, voluntarily or involuntarily, to be employed by the Company, Shares shall be purchased in accordance with paragraph A. immediately above as though he had then become deceased." SHAREHOLDERS AGREEMENT § III (1994) (emphasis added).

Approximately one month after the 1994 Agreement was executed, RAS was recapitalized, increasing its authorized shares from 4,000 shares of common stock to 8,000 shares of stock of which: (1) 2,500 shares were Class A voting stock without par value and (2) 5,500 shares were Class B common non-voting stock without par value. Later that year, on December 31, 1994 and again on January 1, 1995, RAS paid bonuses to both Robert and Steven in the amount of 157.5 shares of Class B stock. Two years later, Robert and Steven's ownership increased again when Eckstein gave each 431

shares of Class A voting stock. After this transaction, RAS redeemed the remainder of Eckstein's shares. The resulting distribution of Class A voting shares and Class B non-voting shares was (1) William with 996 Class A and 996 Class B, (2) Robert with 555 Class A and 439 Class B shares, and (3) Steven with 555 Class A and 439 Class B shares.

In addition to being shareholders, William, Robert and Steven have served as directors of RAS. Once Eckstein had tendered his remaining shares back to the Company, William was elected President of RAS—a position he occupied from 1997 to 2008. According to William, during this period he was instrumental in RAS' significant growth evidenced by its expansion to another location in Tampa, Florida and gross annual sales between $25 and $30 million. In addition, William alleges he was the key developer of specialty software used by RAS known as CORE Pro, RAS-Bid and CAT-Pro. This software allows RAS employees to purchase salvage parts without being physically present to inspect the salvage automobiles and component parts. According to William, this software provided RAS with a significant competitive advantage in the industry, and in 2008 it was patented by the U.S. Patent and Trademark Office. In contrast to William's account, Defendants paint a less rosy picture of William's tenure in office and how it impacted RAS. They assert William was absent from his duties as President, used a caustic and chaotic management style, alienated RAS employees and took overly expensive and often unnecessary trips on the Company's dime. According to Defendants, they discussed with William his behavior, but it continued without change.

At a July 24, 2008 RAS Board of Directors Meeting at which all the Parties were present, Robert and Steven voted to remove William from his position as President and to terminate his employment with the Corporation. Robert and Steven assert that William

was fired because his unacceptable behavior had continued unabated and key RAS personnel were threatening to leave the Company as a result. William argues that he was never told the reasons for his termination either at the July 24, 2008 meeting or subsequently until during the course of the instant litigation. On July 31, 2008, a letter was sent from Robert to William confirming William's termination and announcing Robert's and Steven's intentions to repurchase William's shares of RAS pursuant to the repurchase provision of the 2004 Agreement cited above. William has not tendered his shares to Robert and Steven. He alleges his termination was not due to purported misconduct but rather a conspiracy between Robert and Steven to force William into selling his shares to them at below market value with the ultimate goal of selling the Company to a third-party buyer and keeping profits from the sale for themselves.

William filed an amended complaint on June 30, 2011 alleging that (1) Defendants breached their fiduciary duties to William by firing him so as to repurchase William's shares at a below-market rate, (2) Defendants breached their fiduciary duties to the Company by terminating William so that Defendants could realize a personal profit at the expense of disrupting RAS' on-going operations, (3) William was wrongfully terminated without cause, (4) Defendants breached the 1994 Agreement's company valuation provisions by falsifying Company financial information, (5) William is entitled to declaratory judgment with regard to his rights as a wrongfully terminated shareholder, (6) the 1994 Agreement itself is invalid, (7) William is entitled to injunctive relief against Defendants enjoining them so as to allow William to resume his prior participation in management and also prohibiting Defendants from raising their salaries without William's approval, and requesting (8) appointment of an equitable receiver to protect

RAS' assets from being dissipated or wasted due to Defendants' mismanagement. Because William's wrongful termination claim is in essence a direct claim against his employer RAS, RAS was permitted to intervene so as to defend on that issue.

Both Parties have moved for partial summary judgment. William first seeks summary judgment on Count I of the Complaint, that Defendants breached their fiduciary duties owed to him by terminating him for no legitimate business reason. William also seeks summary judgment on Counts III and V of the Complaint that he was wrongfully terminated without cause and that he is entitled to declaratory judgment with regard to the Parties' rights and obligations. Defendants seek partial summary judgment on Count I of the Complaint, that William did not have a reasonable expectation of employment and thus, firing him was not a breach of their fiduciary duties. They also seek partial summary judgment on Count VI, that the 1994 Agreement is valid.

## II

## Standard of Review

Summary judgment should be granted when, after reviewing the admissible evidence in a light most favorable to the non-moving party, "'no genuine issue of material fact is evident from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' and the motion justice finds that the moving party is entitled to prevail as a matter of law." Smiler v. Napolitano, 911 A.2d 1035, 1038 (R.I. 2006) (quoting Super. R. Civ. P. 56(c)). When considering a motion for summary judgment, the court "does not pass upon the weight or credibility of the evidence, but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion." Palmisciano v. Burrillville Racing Ass'n, 603 A.2d 317,

320 (R.I. 1992). In this vein, "the justice's only function is to determine whether there are any issues involving material facts." Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981).

A party opposing summary judgment must set forth specific facts demonstrating the existence of genuine issues of material fact and cannot "rest on allegations or denials in the pleadings or the conclusions or on legal opinions." Macera Brothers of Cranston, Inc. v. Gelfuso & Lachut, Inc., 740 A.2d 1262, 1264 (R.I. 1999). If the trial justice is satisfied that no genuine issues of material fact exist, the trial justice may determine whether the moving party "is entitled to judgment as a matter of law." Lynch v. Spirit Rent-A-Car, Inc., 965 A.2d 417, 424 (R.I. 2009). Only when the justice is satisfied that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law may summary judgment be granted. Tangleridge Dev. Corp. v. Joslin, 570 A.2d 1109, 1111 (R.I. 1990).

## III

## Analysis

### A

### Breach of Fiduciary Duty to William

William argues that RAS is a close corporation and as a shareholder, he is owed a fiduciary duty analogous to that of partners in a partnership. He claims that by virtue of this fiduciary duty, he is entitled to the reasonable expectations of his investment without interference by Defendants. William asserts that at RAS, continued employment was one of his reasonable expectations as a shareholder, and because, as he alleges, he was summarily fired by Defendants in an attempt to freeze him out of the corporation,

Defendants have breached their fiduciary duties. William argues that these actions by Defendants are motivated by self-interest and constitute shareholder oppression by defeating his reasonable expectations as a shareholder.

In response, Defendants argue William does not have a reasonable expectation of employment because the 1994 Agreement demonstrates the Parties' understanding that no such expectation exists and that the only expectation that does exist is the repurchase of a shareholder's shares upon termination of employment. Defendants also allege that even if William had a reasonable expectation of continued employment, his conduct provided a legitimate business reason for his termination. It is William's position, however, that because Defendants have argued that they could fire William for any reason and did not tell William the reasons for his termination when he was fired, it is too late for Defendants to reverse course and argue that they had legitimate reasons for firing him.

**i**

**Reasonable Expectation of Employment**

Rhode Island has long recognized that corporate officers and directors stand in a fiduciary capacity to the corporation and the corporation's shareholders. See Boss v. Boss, 98 R.I. 146, 152, 200 A.2d 231, 235 (R.I. 1964). Similarly, it has been decided that partners in a partnership owe fiduciary duties to each other as well as to the partnership. See Sullivan v. Hoey, 102 R.I. 487, 488, 231 A.2d 789, 790 (R.I. 1967). Because of their close working relationships and mutual dependence on each other for the success of the partnership, the duty owed between partners is one of utmost care and loyalty, a higher duty than that of corporate officers. See Tomaino v. Concord Oil, 709 A.2d 1016, 1021

(R.I. 1998). The Supreme Court has differentiated between family and close corporations and larger corporations on the basis that close corporations operate more as partnerships than as corporations. See Broccoli v. Broccoli, 710 A.2d 669, 673 (R.I. 1998). Some notable similarities between partnerships and close corporations have included "the small number of shareholders . . . the active participation by these shareholders in management decisions, and their close and intimate working relations." A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997); See also Donahue v. Rodd Electrotype Co. of New England, Inc., 367 Mass. 578, 585-88, 328 N.E.2d 505, 511-12 (Mass. 1975) (detailing contrast between traditional and close corporations, including a limited market for close corporation shares) (internal citations omitted). By deciding to operate as if they are partners, shareholders of close corporations assume the same fiduciary duties as if they were partners. See A. Teixeira & Co., 699 A.2 at 1387. In the instant case, it is clear to the Court that RAS operates as a close corporation in the context referred to above. It has only three shareholders, the Parties, who were actively involved in the management and operation of the Company. That management is shared exclusively amongst them demonstrates their close working relationships. Accordingly, the Court finds the Parties, as shareholders in RAS, assumed partner-like fiduciary duties.

As already noted, William alleges that his termination and the demanded repurchase of his shares is a breach of fiduciary duty and amounts to shareholder oppression. In the context of close corporations, the Supreme Court has defined oppressive conduct both as conduct that "deviates from a heightened good faith standard that exists in a closely held corporation," and as "conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the

closed corporation." Hendrick v. Hendrick, 755 A.2d 784, 791 (R.I. 2000) (internal citations omitted). Oppression may occur when the majority refuses to declare dividends, drains off corporate earnings in the form of exorbitant salaries and bonuses for themselves, and/or "deprive minority shareholders of corporate offices and of employment by the company." Donahue, 367 Mass. at 588-89, 328 N.E.2d at 518. Thus, the denial of employment is a well-accepted form of shareholder oppression in close corporations. See Hendrick, 755 A.2d at 786-87, 791 (expectation of employment discussed where minority shareholder was terminated after contesting the terms of a shareholder agreement in regards to the repurchase of her late husband's shares). See also Wilkes v. Springside Nursing Home, 370 Mass. 842, 849-50, 353 N.E.2d 657, 662 (Mass. 1976) (stating "The denial of employment . . . is especially pernicious in some instances. . . . [because] the minority stockholder typically depends on his salary as the principal return on his investment, since the earnings of a close corporation . . . are distributed in major part in salaries, bonuses and retirement benefits.") (internal citations omitted); Pedro v. Pedro, 489 N.W.2d 798, 802 (Minn. App. 1992) (stating that reasonable expectations include a job, a salary and significant place in management), review denied (Minn. Oct. 20, 1992) (quoting Joseph E. Olson, A Statutory Elixir for the Oppression Malady, 36 Mercer L. Rev. 627, 629 (1985)). Some factors used in other jurisdictions to determine the existence of a reasonable expectation of employment have included whether (1) a shareholder's salary and benefits constitute de facto dividends, (2) a shareholder procured shares of the corporation in part to ensure continued employment, (3) a shareholder owns a significant portion of the corporation's stock, (4) a shareholder's shares are not part of a general benefits package offered to most if not all of

the corporation's employees and (5) the existence of a shareholders' agreement governing shareholder expectations. See Gunderson v. Alliance of Computer Professionals, 628 N.W.2d 173, 191 (Minn. 2001); A. Teixeira & Co., 699 A.2d at 1387 (noting that shareholders' intent may be "evidenced by a stockholders' agreement or other relevant evidence."), Hollis v. Hill, 232 F.3d 460, 471 (5th Cir. 2000) (noting importance of distinguishing "investors who obtain their return on investment through benefits provided to them as employees from employees who happen to also be investors").

The Court finds William's ownership in RAS does seem to go hand-in-hand with his employment. Unlike an employee who is offered an opportunity to purchase shares as a compensation benefit by virtue of employment, see Merola v. Exergen Corp., 423 Mass. 461, 465-66, 668 N.E.2d 351, 354-55 (Mass. 1996), it appears from the facts that William was given shares by Eckstein as a reward for past dedication to RAS.[1] It would appear that ownership in RAS was a prerequisite for participating in the management of the Company since only the shareholders served in management positions and as directors, and there is no showing that shares in RAS were ever offered to other employees as compensation. Since the redemption of Eckstein's shares, William has held the largest number of voting shares amongst the three shareholders, and there is no evidence the Parties drew dividends—suggesting salaries from employment rather than

[1] It should be noted that the Court rejects Defendants' argument that because William was given his shares from Eckstein rather than contributing his own capital, William somehow does not have an expectation of continued employment. A shareholder is not denied his reasonable expectations merely because he did not invest his own money. This view finds support in Hendrick where the Court found the plaintiff had an expectation of employment despite inheriting her shares from her late husband rather than investing her own money. 755 A.2d at 787, 793.

traditional investment earnings was the agreed upon form of compensation.[2] There is, however, the existence of the 1994 Agreement, which Defendants allege demonstrates that the Parties understood they could be terminated for any reason—hence no expectation of continued employment.[3] Instead, they argue, the 1994 Agreement shows the Parties understood that upon termination, they were entitled to the purchase of their shares pursuant to an agreed upon formula contained in the Agreement. Thus, Defendants claim that William's investment expectations are already protected. See Hollis, 232 F.3d at 471 (stating "[t]he minority shareholder interest is not injured, however, if the corporation redeems shares at a fair price or a price determined by prior contract or the shareholder is otherwise able to obtain a fair price."); Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1313 (N.Y. 1989) (finding no fiduciary-rooted exception against at-will discharge for minority shareholder in close corporation when repurchase of his shares was pursuant to repurchase-upon-termination-clause in shareholders' agreement).

William makes three arguments in response to Defendants' assertions. He first alleges that the 1994 Agreement is invalid because prerequisites stated in the Agreement's recitals did not exist at the time the Agreement was signed nor have they occurred since. Secondly, he argues that the language concerning cessation of employment "voluntarily or involuntarily" contained in the 1994 Agreement is not sufficiently specific to suggest William understood he could be fired for any reason or for

[2] In his second affidavit, William states that for more than twenty (20) years he has never received a dividend from the Company. 2nd Aff. W. Grady, ¶ 7 (Aug. 12, 2011).

[3] As quoted in the Facts and Travel, the relevant provision of the 1994 Agreement states that a shareholder's shares in RAS must be repurchased by the other Shareholders if he "ceases, voluntarily or involuntarily, to be employed by the Company." § III ¶ B.

no reason at all. William further argues that if the Court concludes that the 1994 Agreement is valid and that the Parties did not have a reasonable expectation of continued employment, the repurchase provisions of the Agreement should only apply to those shares he possessed at the time the 1994 Agreement was signed.

**a**

**Validity of the 1994 Agreement**

William first argues that the 1994 Agreement is invalid because the ownership structure stated in the recitals of the Agreement did not take place. Specifically, William points to the first paragraph of the recitals which states:

> "The Shareholders own and/or expect to own all of the issued and outstanding shares . . . as follows:
>
> | | |
> |---|---|
> | William H. Grady | 996 shares |
> | Robert J. Grady | 124 shares |
> | Steven M. King | 124 shares" |
>
> RECITALS TO AGREEMENT ¶ 1.

William points out that in 1994, the Parties did not own all of the outstanding shares. At the time, Eckstein was the majority shareholder with 1,296 shares. In addition, William notes that at no time after the 1994 Agreement did the Parties own all of the outstanding shares of the Company in the ratio of stock ownership stated above. The reason for this, according to William, is that RAS was subsequently recapitalized and only a portion of Eckstein's stock was redeemed by the Company rather than all of Eckstein's shares as, according to William, the 1994 Agreement contemplated. Thus, the ownership structure of the Company never reflected the expectations of the Parties written in the recitals of the Agreement. William therefore argues that the purpose of the 1994 Agreement, for the

Parties to own shares according to the numbers stated in the recitals, was frustrated and the Agreement is therefore invalid.

William's argument with regard to the recitals is premised on the notion that recitals to a contract are part of the contract's operative language. This simply is not the case absent some reference in the body of a contract to the recitals or language in the recitals that is helpful in supplying an omitted term or clarifying an ambiguity in the contract. See Berg v. Berg, 201 Minn. 179, 189, 275 N.W. 836, 842 (1937) (stating that preambles may assist in construing contracts or omission but in "no sense will it be the basis of a legal and binding obligation of the parties."); Sclafani v. Gama et al, No. PC-88-0168, 1993 R.I. Super. LEXIS 78, *8 (R.I. Super. Ct. Sept. 17, 1993) (Gibney, J.) (finding existence of a condition precedent by the use of the phrase "contingent on" in the operative portion of a contract and noting that conditions precedent are normally stated in clear and unambiguous language); First Bank and Trust Company of Illinois v. The Village of Orlando Hills, 338 Ill. App. 3d 35, 44-45 (2003) (holding that recitals to an agreement are not to be "an effective part of the agreement unless referred to in the operative portion of [the] agreement"). The Court finds neither a reference in the 1994 Agreement to the recitals themselves nor an expression of any conditions precedent which must occur before the Agreement is enforceable. Further, there are no provisions in the Agreement for which the division of shares in the recitals seem relevant. The Court therefore finds that the recital's division of shares is merely a snapshot statement of the Parties ownership at the time the 1994 Agreement was executed and not a condition precedent to the enforceability of the 1994 Agreement.

The Court further rejects William's assertion that the essential purpose of the 1994 Agreement is frustrated by the fact that the Parties never owned all the outstanding shares in the ratio of stock ownership indicated in the recital. Rescission of a contract due to frustration of purpose is a rare course of judicial action and requires a showing that (1) the contract is at least partially executory, (2) a supervening event occurred after the contract was made, the nonoccurrence of which was a basic assumption of the contract, and (3) the occurrence substantially frustrated the parties' principal purpose for the contract. See Iannuccillo v. Material Sand & Stone Corp., 713 A.2d 1234, 1238 (R.I. 1998). In the instant case, the Court finds no evidence that ownership of the corporation, according to the numbers stated in the recitals, was itself a principal purpose of the Agreement, nor that it had any bearing on the purposes for which the 1994 Agreement was signed. The purpose of the Agreement was undoubtedly to provide a smooth procedure for the disposition of shares—both to provide a ready market for shares as well as to preserve proper management of RAS. Thus, the Court finds no frustration of purpose and rejects this portion of William's argument. Accordingly, the 1994 Agreement is valid and summary judgment in favor of Defendants on this issue is proper.

**b**

**Affect of 1994 Agreement on William's Expectation of Employment**

Defendants allege that pursuant to the 1994 Agreement, which the Court has determined to be valid, William has no expectation of continued employment. Rather, they contend that his reasonable investment expectations are the repurchase of his shares if he should no longer be employed by RAS—either voluntarily or involuntarily. William opines that merely agreeing to contingencies in the event he ceases to be

employed by RAS does not mean he should have understood he could be fired for any reason or no reason altogether. He notes that his salary from RAS was his principal source of income as a shareholder and that he held management positions at RAS, particularly as company president, primarily because of his status as a shareholder. Thus, he argues that because his roles as shareholder and employee were so intertwined, the vague language at issue cannot be taken as conclusive proof that he had no expectation of continued employment.

As discussed above, not all expectations of continued employment are reasonable. Written agreements entered into by shareholders are presumed to reflect their reasonable expectations. See Blank v. Chelmsford OB/GYN, P.C., 420 Mass. 404, 408, 649 N.E.2d 1102, 1106 (Mass. 1995) (stating that questions of fiduciary duties with respect to rights upon termination and repurchase "do not arise when all the stockholders in advance enter into agreements concerning" these issues); Gunderson, 628 N.W.2d at 190 (stating "shareholders who sign buyout agreements permitting termination of employment for any reason and obligating shareholders to sell their shares to the corporation upon termination of employment would not likely have a reasonable expectation of continuing employment"). In these instances, fiduciary obligations to the departing shareholder are essentially limited to the basic assumptions of employment—namely a fair buyout of his or her shares. Hollis, 232 F.3d at 471 (noting that "shareholder interest is not injured [] if the corporation redeems shares at a fair price or a price determined by prior contract or the shareholder is otherwise able to obtain a fair price"); Ingle, 528 N.Y.S.2d 602, 604 (N.Y. App. Div. 1988) (concluding "a fiduciary duty does not arise out of a shareholders'

agreement . . . where the minority has assented to a mandatory repurchase-upon-termination-of-employment clause").

Shareholder agreements, however, are not necessarily dispositive of shareholder expectations, and often expectations arise from understandings that are not expressly stated in the corporation's documents. Gunderson 628 N.W.2d at 186 (recognizing that written shareholder agreements should "be honored to the extent they specifically state the terms of the parties' bargain). Further, the mere fact that shareholders in close corporations have entered into stock purchase and employment agreements does not relieve them of the high fiduciary duties owed in mutual dealings. See Blank 420 Mass. at 408, 649 N.E.2d at 1106; King v. Driscoll, 418 Mass. 576, 586, 638 N.E.2d 488, 499 (Mass. 1994) (finding agreement of shareholders on repurchase price upon termination of employment did not in and of itself relieve shareholders of their fiduciary duties of good faith and fair dealing). Further, where the evidence absent the 1994 Agreement rather convincingly supports the notion that shareholders in RAS do in fact have a reasonable expectation of employment, the Court is reluctant to find William surrendered this expectation unless that intention is clear from the Agreement.

The Court notes that language contained in the 1994 Agreement concerning cessation of employment either voluntarily or involuntarily is not as specific as that contained in the shareholder agreements considered in the cases upon which Defendants rely. As noted above, the court in Ingle determined that the shareholder-employee in that case did not have a fiduciary expectation of continued employment when he signed a valid stock repurchase agreement. 535 N.E.2d at 1313. In that case, however, the relevant provision of the agreement provided for the purchase of Ingle's shares if he

"shall cease to be an employee for the Corporation for any reason." Id. at 1312 (emphasis added). Another case relied on by Defendants, Kortum v. Johnson et al, also considered whether the signing of a re-purchase-upon-termination clause negated a shareholder's employment expectations. The relevant provision in that case stated "[i]f any Shareholder shall voluntarily or involuntarily terminate his employment with the Corporation, for any reason whatsoever, he shall sell his shares under the terms and conditions as set forth . . ." 2008 ND 154, 755 N.W.2d 432, 436 (ND 2008) (emphasis added). Another case discussed above and relied on by Defendants, Blank v. Chelmsford OB/GYN, P.C., concerned a stock repurchase agreement that required repurchase of a shareholder's shares upon certain triggering events, including "[u]pon termination by the Shareholder or by the Corporation of the employment of the Shareholder by the Corporation for any reason whatsoever." 420 Mass. at 406, 649 N.E.2d at 1105 (emphasis added). The language before the Court in the instant case, however, is not nearly as precise. William argues that cessation of employment "voluntarily or involuntarily" does not rise to the level of clarity as language at issue in the above cited cases. The Court agrees. The use of the word "involuntary" in the 1994 Agreement without more does not necessarily mean that the parties understood they could be terminated for any reason. Involuntary cessation of employment might mean leaving the Company due to the occurrence of some circumstance over which the shareholders had no control such as a serious illness. The Supreme Court has specifically recognized that continued employment is often a key expectation of shareholders in a close corporation. See Hendrick, 755 A.2d at 791-92 (stating "oppressive conduct can manifest itself in a range of actions . . . [shareholders] may deprive minority shareholders of corporate

offices and of employment by the company") (internal citations omitted). The Court finds it contradictory to the reasonable expectation analysis endorsed in Hendrick for it to conclude on such vague language alone that William lacked an expectation of employment with RAS. See Id. at 791 (noting "[t]he reasonable expectation analysis also recognizes the fact sensitive nature of judicial inquiry into this area . . . .").

Accordingly, the Court concludes that Defendant's argument that due to the provisions of the 1994 Agreement, William did not have a reasonable expectation of employment is unavailing. The Court finds instead that, due to the course of dealing between the parties and the clear ties between their status as shareholders and roles as employees discussed above, William did have a reasonable expectation of employment. Defendants' motion for summary judgment on this issue, therefore, is denied as a matter of law.

**c**

**Applicability of 1994 Agreement to Shares Acquired Post-Execution**

William next argues that the scope of the 1994 Agreement's provisions apply solely to the shares then owned by the Parties at the time the 1994 Agreement was signed. He points again to language in the recitals of the 1994 Agreement that states "[t]he shareholders own and/or expect to own all of the issued and outstanding shares (collectively, "the shares") of [RAS] . . . ." The Court has already determined that the recitals of the 1994 Agreement are not operative. Thus, looking to the actual binding language of the Agreement, the Court first notes that the shares owned by a shareholder who no longer works for RAS "shall be purchased in accordance with paragraph A. . . . as though (the Shareholder) had then become deceased." AGREEMENT § III ¶ B.

Paragraph A requires shareholders to purchase the shares of the deceased shareholder "owned at the time of the death of such Shareholder." AGREEMENT § III ¶ A. Thus, the number of shares owned by William at the time of his termination, rather than the number he owned at the time the 1994 Agreement was signed, is the number of shares governed by the repurchase provision. See, Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 558 (R.I. 2009) (stating "[i]n situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids."). This interpretation comports with the purpose of the Agreement stated in the recitals, which was intended to provide:

> "a ready market for the disposition of Shares upon the death, disability or termination of employment of a Shareholder and to avoid possible dissension and the introduction of inexperienced management into the affairs of the Company by reason of transfer of Shares." AGREEMENT RECITALS.

The recital clearly reflects a desire for an on-going understanding with regard to the overall shares of the Company, not just the shares owned by the Shareholders in 1994. The Court therefore concludes that the 1994 Agreement applies to all of the shares owned by William at the time he was terminated.

**ii**

**Legitimate Business Purpose Test**

Having decided that William does have a reasonable expectation of employment, the Court notes that an expectation of employment is not the equivalent of a guarantee of employment. Thus, the Court's conclusion that William has an expectation of employment is not dispositive of whether Defendants breached their fiduciary duties by firing him. Hollis, 232 F.3d at 470 (noting that "opinions make clear [] that shareholders

do not enjoy fiduciary-rooted entitlements to their jobs"). Imposing such a strict standard upon the majority would severely restrict their ability to make sound management decisions for the good of the corporation, particularly so as to include continued employment to a shareholder whose conduct objectively warrants termination. See Wilkes, 370 Mass. at 850, 353 N.E.2d at 663 (recognizing majority's right to "selfish ownership in the corporation which should be balanced against the concept of their fiduciary obligation to the minority") (internal citations omitted); Bogosian v. Woloohojian, 167 F. Supp. 2d 491, 498-99 (D.R.I. 2001) (finding the firing of minority shareholder warranted when she was chronically absent and neglectful of her duties). To strike this balance, courts in other jurisdictions have used what is termed "The Legitimate Business Purpose Test" (hereinafter "Test"). See Medicare Air Tech. Corp. v. Marwan Inv., Inc., 303 F.3d 11, 21 (1st Cir. 2002); A.W. Chesterton Co., Inc. v. Chesteron, 128 F.3d 1, 6-8 (1st Cir. 1997); Hollis, 232 F.3d at 470-71; Nelson v. Martin, 958 S.W.2d 643, 648-49 (Tenn. 1997); Solomon v. Atlantis Dev., Inc., 516 A.2d 132, 136 (Vt. 1986); Toner v. Baltimore Envelope Co., 498 A.2d 642, 653-54 (Md. 1985); Wilkes, 370 Mass. at 851. When a terminated shareholder has brought suit alleging breach of a fiduciary duty owed to him by the majority, the Test requires a court to ask whether the controlling group "can demonstrate a legitimate business purpose for its action." Wilkes, 370 Mass. at 851, 353 N.E.2d at 663. In regards to this question, the Wilkes court stated:

> "[w]e acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing salaries for corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees." Id.

If the majority can demonstrate a legitimate business purpose as the basis for such firing, the aggrieved shareholder may respond by demonstrating that the legitimate purpose could have been achieved through a less harmful alternative. Id. at 851-52. The Court notes that the Test is of first impression in Rhode Island, but the Court presumes the Supreme Court would look to the jurisprudence of other states that have previously considered the issues before the Court in this matter.

**a**

**Legitimate Business Purpose for Firing William**

To determine whether Defendants had a legitimate business purpose for firing William, the Court looks to the contrasting accounts of William's performance offered in William's and Robert's affidavits. As a preliminary matter, however, William contends that Defendants are prohibited from offering evidence in support of a legitimate business purpose for his termination. William first notes that Robert and Steven's main defense throughout litigation was that the 1994 Agreement allowed them to terminate William for any reason. William claims therefore that Defendants are prevented by judicial estoppel from changing course and now arguing they possessed a legitimate business purpose for firing him. William also alleges that he was never told at the time he was fired what the reasons were for his termination. Because generally an employer may not present reasons for firing an employee at litigation if those reasons were never expressed during the employee's firing, William claims Defendants are prohibited from doing so now.

**1**

**Judicial Estoppel**

Judicial estoppel is an equitable doctrine used by courts to prevent parties "from 'deliberately changing positions according to the exigencies of the moment.'" Gaumond v. Trinity Repertory Co., 909 A.2d 512, 520 (R.I. 2006) (quoting New Hampshire v. Maine, 532 U.S. 743, 749-50 (2001)). Since its application essentially prevents a party from offering otherwise admissible evidence, judicial estoppel is considered extraordinary relief and "will not be applied unless the equities clearly [are] balanced in favor of the part[y] seeking relief." Southex Exhibitions, Inc. v. R.I. Builders Assoc'n, 279 F.3d 94, 104 (1st Cir. 2002). Unlike equitable estoppel which arises between litigants, "judicial estoppel focuses on the relationship between the litigant and the judicial system as a whole." D & H Therapy Associates v. Murray, 821 A.2d 691, 693 (R.I. 2003). Rhode Island essentially employs a two-prong analysis when considering whether to apply the Doctrine. The first prong is whether the party advancing the inconsistent argument will obtain an unfair advantage if not estopped. Id. at 694. Secondly, a court must determine whether a court was persuaded by a party's initial argument such that to allow that party to assert a contradictory position would "create 'the perception that either the first or the second court was misled.'" Id. (quoting New Hampshire, 532 U.S. at 750).

In D & H Therapy Associates, the defendant was a former patient who was being sued for unpaid physical therapy bills. After being found liable, the defendant contested the amount in damages plaintiff had requested on the grounds that the plaintiff's fees for services were excessive and unreasonable. 821 A.2d at 692-93. In a related case

concerning the accident which led to the defendant needing the physical therapy, the defendant actually took the opposite position—that his physical therapy bills were reasonable and that the liable party should pay them. Id. In the second action, defendant argued that the bill he used as evidence in the first trial was actually not as accurate as he originally thought. Id. The court rejected this maneuver and estopped the defendant from asserting the exact opposite position which the prior court had relied on in rendering its decision. Id. (commenting "[h]aving eaten his cake, defendant may not renounce its calories."). The Court does not find the facts of the instant case to be analogous to D & H Therapy Associates. Unlike the defendant in that case who held one position and then completely contradicted himself in the second proceeding, Defendants have never argued that they did not have a legitimate reason for terminating William. There is a fundamental difference between contradicting oneself and simply raising new arguments to address new issues that may arise over the course of discovery and litigation. In addition, this Court has yet to decide whether Defendants had legitimate reasons for firing William. Thus, there is no danger that the Court might reach inconsistent findings.

The Court also disagrees with William that he was taken by surprise at the last moment by Defendants' evidence. The Court notes that it was William who first raised his performance as an employee in the factual background section of the First Amended Complaint. Specifically, the Complaint at paragraph 42 states "Robert and King had no cause or reason to terminate William's employment." In response, Defendants' Answer at paragraph 42 stated "deny." The Court further notes that during discovery, William requested documents from Defendants on the issue of Defendants' reasons for terminating William. When Defendants failed to respond to that request, William did not

follow up with a motion to compel. The facts before the Court are inopposite to another case relied on by William, Gaumond v. Trinity Repertory, 909 A.2d 512 (R.I. 2006) in which Trinity was sued for injuries suffered by a patron. During a deposition, the defendant learned that previous versions of a key injury report existed and sought to have them produced. Id. at 515. While plaintiff's counsel initially assured defendants that the prior reports would be provided, it subsequently requested a protective order claiming the prior versions were confidential under Federal law. Id. at 514-15, 516. Finding that the plaintiff could not keep from defendants prior versions of a document plaintiff planned to use for its own benefit, the court stated "[i]f Gaumond had wished to prevent discovery of the injury report, in any of its iterations, he should not have produced the revised version that he obviously intended to use to his advantage in pursuing his claim." Id. at 520. Here, no assurances were made by Defendants that evidence of William's misconduct would not be presented. As discussed above, by virtue of Defendants' Answer, William was on notice that Defendants contested his claim that there was no just cause or legitimate reason for his termination, yet William failed subsequently to address Defendants' denial. The Court therefore finds that Defendants are not estopped from presenting evidence in support of just cause and legitimate business reasons for William's termination.

**2**

**Presenting Cause for William's Termination**

Whether an employee was properly terminated for cause is a contractual inquiry that arises under employment rather than corporate law. When terminating an employee who by contract can only be terminated for-cause, an employer must communicate to the

employee the reasons for his termination, and in general the employer cannot subsequently claim cause existed if none was communicated to the employee at the time he was fired. See Hammond v. T. J. Little & Co., Inc., 82 F.3d 1166, 1175 (1st Cir. 1995). In the absence of an employment contract, an employee is considered to be at-will and "is subject to discharge at any time for any permissible reason or no reason at all." New England Stone, LLC v. Conte, 962 A.2d 30, 33 (R.I. 2009). Wrongful termination, therefore, is a wholly separate doctrine that courts recognize is often confused with the reasonable expectation of employment analysis employed in the context of shareholder fiduciary duties. See Ingle, 73 N.Y.2d at 188 (stating "[i]t is necessary . . . to appreciate and keep distinct the duty a corporation owes to a minority shareholder as a shareholder from any duty it might owe him as an employee") (emphasis added). "The analysis under the separate doctrines should attempt to protect close-corporation employment [expectations] and, at the same time, respect the legitimate sphere of the at-will rule." Gunderson, 628 N.W.2d at 190; See Hollis, 232 F.3d at 470-71 (noting "[s]hareholders do not enjoy fiduciary-rooted entitlements to their jobs. Such a result would clearly interfere with the doctrine of employment-at-will."). See generally Douglas K. Moll, Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution, 1999 U. ILL. L. REV. 571 (1999). In addition, the Court notes that if shareholders in close corporations, by virtue of that status alone, could be fired only "for-cause", there would be no point to the unique protection afforded shareholder-employees by the reasonable expectations analysis. As the Supreme Court has held in Hendrick, "[reasonable expectation approach] takes into account the fact that shareholders in close corporations may have expectations that differ [] from those of shareholders in public

corporations." 755 A.2d at 791 (also noting "the fact sensitive nature of judicial inquiry into this area . . ." Id.). The Court concludes, therefore, that in the context of their fiduciary duties owed to William, Defendants were not required to inform him of the reasons for his termination. Defendants instead must persuade the Court that the firing of William was for a legitimate business purpose, and they are entitled to present evidence pursuant to this requirement.

Considering all of the evidence provided by both Parties, the Court first notes the extensive account in Robert's affidavit that describes William's conduct as highly detrimental to the Company. For example, Robert recounts that William was chronically absent from work and when he did come, his arrivals were sporadic and unannounced. Robert also claims that when William was present, he often interfered with the daily operations of the Company, often pulling employees away from their assigned duties and instructing them to carry out unnecessary tasks in a show of his authority. In addition, Robert relates instances of William's poor business decisions, alienation of key Company customers and a combative attitude that almost drove the Chief Operating Officer of RAS to submit his resignation.

By contrast, William's affidavit notes that while he was President, RAS' gross annual sales grew to between $25 to $30 million and that RAS expanded to two locations, Rhode Island and Florida, and employed seventy-five employees. William also alleges he played a key role in the development of the CORE Pro, RAS-Bid, and CAT-Pro software that has been valuable to RAS. William has also noted that in 2008, he received a citation from the Automotive Parts Remanufacturers Association for his dedication to the industry. None of this, however, addresses the extent to which William's decisions

and actions actually contributed to the successes of RAS that he refers to. Merely holding office does not mean one has actually played a meaningful role in a corporation's success.

Analysis of a shareholder-employee's performance in this context is best exemplified by the landmark Wilkes case mentioned above. In Wilkes, the aggrieved shareholder was terminated after tensions arose between him and three other shareholders. When the remaining shareholders sought to repurchase his shares due to his termination, Wilkes filed suit alleging he was terminated so that the remaining shareholders could obtain his shares at an unreasonably low price. Applying the legitimate business purpose test for the first time in Massachusetts, the Supreme Judicial Court found "no showing of misconduct on Wilkes' part as a director, officer or employee . . . which would lead us to approve the majority action as a legitimate response to the disruptive nature of an undesirable individual . . ." Wilkes, 370 Mass. at 852, 353 N.E.2d at 664. Instead, the Court noted that the record showed Wilkes competently carried out his tasks and was willing to do so. Id., 353 N.E. 2d at 664. Failing to see a reason for his termination other than a nefarious plot on the part of his fellow shareholders, the court found a breach of fiduciary duties owed to him.

In the case at bar, the Court cannot but conclude that a legitimate business purpose existed for William's firing. Robert's affidavit is replete with assertions that William was absent from his duties, irresponsible with RAS' money, and disruptive to RAS operations. See Gunderson, 628 N.W.2d at 192 (stating "an expectation of continuing employment is not reasonable and oppression liability does arise when the shareholder-employee's own misconduct or incompetence causes the termination of

employment"). William's affidavit does not address these matters directly but rather describes a correlation between his holding office and RAS' growth during that timeframe. Accordingly, the Court finds that Defendants may have had a legitimate business purpose for terminating William subject to whether his termination was the least harmful alternative,

**b**

**Least Harmful Alternative**

In attempting to determine whether there were less harmful alternatives short of firing William, the Court finds that issues of material fact exist that prevent the Court from granting summary judgment. Based on what has been presented by the parties, it is still unclear whether conversations amongst the Parties regarding William's behavior and mismanagement were direct and substantive or merely passing comments. The record also is unclear whether actual good faith efforts were undertaken to find alternative solutions short of firing William. The Court's analysis is informed by that employed in O'Connor v. U.S. Art Co., Inc. et al, 2005 WL 1812512 (Mass. Super. 2005) where the plaintiff was fired from his position in the midst of negotiations with his counterparts for a mutual separation and redemption of his shares. As the majority, the defendants unilaterally "voted" for plaintiff's termination. The "vote" was taken without a shareholder meeting and the evidence did not show notice of the meeting was given. Id. As a result, plaintiff was effectively frozen out from the corporation and his salary as well as other payments ceased. Id. at *8. While the record showed plaintiff kept inaccurate financial records that were substantially detrimental to the corporation and warranted his termination, the court found there were less harmful alternatives that could have been

pursued. Id. at *9. The court noted that plaintiff's sloppiness was well known to the majority shareholder for years, yet nothing substantive was done about it. Prior to discussions concerning his separation from the corporation, the plaintiff's lack of diligence was never directly discussed with him, and there was no evidence that less harmful options such as hiring bookkeeping staff or reassigning bookkeeping duties were ever considered. Id. Lastly, the court noted that letters between attorneys for the parties the day before the plaintiff's termination demonstrated that the parties were in fact close to a deal. Id. at *10. The court therefore concluded that "the termination of [plaintiff's] employment [did not] . . . express[] the least harmful alternative to his position as holder of a minority interest in a close corporation"). Id.

While the Court will not go as far as O'Connor and declare as a matter of law that firing William in 2008 was or was not the least harmful alternative, the Court finds that O'Connor's analysis exposes key holes in the factual record before it. For example, the Court finds Robert's statement in his affidavit that, in response to incidents of misconduct by William, Robert and Steven would "wait for [William] to cool off before addressing the situation with him, and told him that his behavior was counterproductive," is vague and sheds almost nothing on the substance of these conversations nor William's responses. R. Grady Aff., ¶ 4. Despite the litany of William's misdeeds provided by Defendants, Robert's scant account of their conversations might lead one to think that William may have had no idea that his conduct was becoming intolerable. In addition, there is a glaring absence of evidence detailing the exact conversations that took place at the July 24, 2008 meeting. While William claims no cause was provided to him, the Court questions why, if William had no idea as he claims that his conduct warranted

termination, he would not have demanded answers as to why he was being fired. See generally Klein v. President and Fellows of Harvard College, 25 Mass. App. Ct. 204, 208-09 (Mass. 2004) (cited by William) (holding that because plaintiff was well aware of the hostile nature between herself and staff at the College, she was on notice of the reasons for her termination and employer was not required to specifically address them). Lastly, the Court finds inconclusive evidence that alternatives were explored short of termination. While Defendants recount offers made to William to essentially come up with solutions on his own after he was terminated, the Parties disagree as to whether these offers were hollow or genuine. The Court cannot, therefore, without more evidence conclude as a matter of law that no alternatives were available to Defendants short of terminating William.

**b**

**Wrongful Termination—Breach of Contract**

William moves for partial summary judgment on Counts III and V of his Complaint which seek damages and declaratory judgment concerning his wrongful termination as a shareholder of RAS. To the extent that William seeks to make the same misguided argument that his rights as a shareholder include protection from at-will employment status, the Court rejects this notion for the reasons discussed at length above. See, Ingle, 538 N.E.2d at 1313 (expressing the need to keep separate a duty owed to a minority shareholder from a duty it might owe him as an employee). As the Supreme Court has recognized, without an employment agreement, an employee has no right to continued employment and is "subject to discharge at any time for any permissible reason or for no reason at all." Galloway v. Roger Williams University, 777 A.2d 148, 150 (R.I.

2001). See also Merola v. Exergen Corp., 423 at 466, 668 N.E.2d at 355 (stating "not every discharge of an at-will employee of a close corporation who happens to own stock in the corporation gives right to a successful breach of fiduciary duty claim"). Wrongful termination is a doctrine available to all corporate employees, whether they are shareholders of close corporations or not "if they can establish the existence of an express or an implied contractual agreement or a promise inducing reliance." Gunderson, 628 N.W.2d at 190. Thus, absent an employment contract, the only protection against termination for an at-will shareholder is whether he or she has a reasonable expectation of continued employment and that expectation was defeated in breach of a fiduciary duty owed to him.

The only contract raised in the instant matter is the 1994 Agreement, and William has already argued in the context of his reasonable expectations as a shareholder that its provisions do not give Defendants authority to fire him without cause. The Agreement, he claimed, was merely a contingency plan for the handling of ownership once a shareholder had ceased employment.[4] See Ingle, 73 N.Y.2d at 189 (discussing attempt by plaintiff to enjoy employment security by virtue of the fact that he was party to a repurchase agreement and noting that "[d]ivestiture of his status as a shareholder, by operation of the repurchase provision, is a contractually agreed to consequence flowing directly from the firing, not vice versa.") (Emphasis added). Within the context of shareholder expectations, William argued that the Agreement was too ambiguous as to

[4] In an affidavit submitted by Mr. John Harpootian, Esq., who drafted the 1994 Agreement, Mr. Harpootian states that, though he does not specifically recollect drafting the 1994 Agreement, the language of the relevant provisions of the Agreement is customary and intended to state "only what the consequences of such a termination of employment shall be with respect to ownership of stock in RAS." Aff. Harpootian, ¶ 12 (May 4, 2009).

whether or not Defendants could fire him for any reason. The Court fails to see how William can argue now that, by merely being a party to the Agreement, Defendants could only fire him for cause. The Court will not allow William to have his cake and eat it too. Thus, the Court cannot conclude, on the basis of the 1994 Agreement alone, that William was wrongfully terminated. This does not mean, however, that William did not obtain contractual rights to for-cause employment through a means other than the 1994 Agreement. To decide this, however, requires additional fact-finding and summary judgment therefore is premature. Thus, William's Partial Motion for Summary Judgment on Counts III and V seeking damages and declaratory relief for wrongful termination is denied.

## IV

## Conclusion

After due consideration of all the evidence and memoranda, together with the arguments advanced by counsel at the September 12, 2011 hearing, the Court finds the 1994 Agreement is valid and binding but that it does not adequately reflect the Parties' understandings with regard to their reasonable expectations of employment. In light of accompanying evidence, the Court concludes that William did have a reasonable expectation of continued employment. The Court finds, however, that material issues of fact remain with regard to whether or not Defendants breached their fiduciary duties owed to William when they terminated him on July 24, 2008—specifically whether firing William was the least harmful alternative in dealing with his alleged misconduct and irresponsibility. Lastly, the Court is unable to conclude on the basis of the 1994 Agreement alone whether William was wrongfully terminated.

Accordingly, William's motion for partial summary judgment on Counts I, III and V are denied. Defendants' motion for partial summary judgment that the 1994 Agreement is valid is granted, and their motion for partial summary judgment that William did not have a reasonable expectation of employment is denied.

Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.